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Supreme Court, U.S.
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No. 95-81

In The

Supreme Court of the United States

October Term, 1995

GERALD ELMER BALDERSON,

Petitioner,

v.

SHERRY MAE BALDERSON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The United States

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Idaho Supreme Court properly affirm the lower courts by ruling that the Supremacy Clause of the United States Constitution and 10 U.S.C. 1408(c)(3) did not prevent the trial court from ordering a military member to begin making immediate payments to his ex-wife for her community interest in his retirement benefits before he retires when he had chosen to take an extended retirement date?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are individuals who were formally married.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Judgment and Decree of Divorce in this case, along with Findings of Fact and Conclusions of Law of the Magistrate Court of the Fourth Judicial District of the State of Idaho, was entered December 28, 1992. The Memorandum Decision and Order on appeal to the District Court of the State of Idaho was entered June 9, 1993. The opinion of the Idaho Court of Appeals was entered March 22, 1994, and the opinion of the Idaho Supreme Court was entered on May 22, 1995.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal Constitutional provision involved in this case is the Supremacy Clause found in Article 6, Clause 2, of the United States Constitution.

The Federal statute involved is 10 U.S.C. § 1408.

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the facts and points out that Idaho Law requires the non-employee's share of any retirement be valued at the time of divorce. Since this value is fixed at the time of divorce (i.e. Sherry Balderson will receive $739.55 per month which amount does not increase) (Findings of Fact and Conclusions of Law, Appendix A, 3a, ¶ 10), it is inequitable to require her to wait many years and begin receiving this fixed amount only when her ex-husband decides, in his sole discretion to retire. Since, under Idaho law, the monthly payment amount must be fixed, while the employee spouse receives all benefit of the pension's post divorce increases, the Idaho Courts have required the payments to begin immediately. In this way, Gerald's federal statutory right not to be forced to retire can be balanced with Sherry's equitable right to receive the full present value of her interest in the community property military retirement. Findings of Fact and Conclusions of Law, Appendix A, 13a, ¶ 22.

REASONS FOR DENYING THE WRIT

The Idaho Supreme Court properly affirmed the lower courts by ruling that the Supremacy Clause of the United States Constitution and 10 U.S.C. 1408(c)(3) did not prevent the trial court from ordering a military member to begin making immediate payments to his ex-wife for her community interest in his retirement benefits when he had chosen to take an extended retirement date.

Prior to 1981, military retirement benefits accruing during marriage while the parties were domiciled within a community property state were considered community property for division upon divorce. *See Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

On June 21, 1981, however, the United States Supreme Court issued the decision of *McCarty v. McCarty*, 453 U.S. 219 (1981). *McCarty* held that Federal law preempted state law in that military retirement benefits were not subject to division under state community property laws but were the separate property of the military spouse. The United States Congress directly responded to the *McCarty* decision by enacting the Uniform Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. Section 1408, *et. seq.* The Act became effective February of 1983, and provides that State law determines the character of "disposable" retirement military pay as community property or as separate property.

10 U.S.C. Section 1408 gives state courts the right to treat disposable retired or retainer pay as community property, subject to certain limitations. Section 1408(a)(4) defines disposable or retainer pay as:

> The total monthly retired or retained pay to which a member is *entitled* (other than the retired pay of a member retired for disability in a chapter 61 of this title).
>
> (Emphasis added.)
>
> 10 U.S.C. 1408(a)(4).

Free to once again apply Idaho state law to military retirement benefits, the Idaho Supreme Court in the case of *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68 (1984), unequivocally stated that military retirement benefits, accruing during the marriage while the parties are domiciled in a state permitting the division of such benefits, would be community property. Given the authority for the Idaho Court to apply its community property law to military retirement benefits, Petitioner's contention that USFSPA precluded the Court from valuing and dividing his military retirement benefits while he remains on active duty is misplaced.

I. THERE IS NO ISSUE OF PREEMPTION IN THIS CASE.

A. Present payments do not affect Gerald's pension.

As the Idaho Supreme Court pointed out:

> Because the magistrate court ordered a distribution of the sum equal to Sherry's interest in the military retirement benefits, rather than distributing the pension benefits themselves, we hold that the magistrate court did not err in concluding that Idaho Law was not preempted by 10 U.S.C. § 1408(c)(3).

Opinion of Id. Sup. Ct., Appendix B, page 7b

The payments which Gerald is required to pay prior to his retirement are not payments from his military pension.

B. State law is not preempted in the matter of timing of property division payments.

§ 1408 does not preempt state law on the issue before this Court. "Where, as here, the question is one of statutory construction, we begin with the language of the statute." *Mansell v. Mansell*, 490 U.S. 581, 587 (1989); *see e.g. Blum v. Stenson*, 466 U.S. 866, 896 (1984); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 477 U.S. 102, 108 (1980). There is no language in Section 1408 which precludes the action of the Magistrate Court in this case. The definition of disposable retired pay is pay to which a military member is entitled. (Section 1408(a)(4)). Petitioner was entitled at the time of the Court's action to retirement pay. He could have retired at twenty years, yet voluntarily chose to continue in service until the year 2000. There is no language in the statute requiring that the military member must be receiving the pay he is entitled to before being required to make payments in a community property division. Further, the Court's action in no way forced Petitioner to retire, which would have been in violation of Section 1408(c)(3). That Section provides that:

> This Section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this Section.

10 U.S.C. Section 1408(c)(3).

He continues to be an active member in the military to this day. The Court's action did not involve forcing Petitioner to retire or apply to retire.

Petitioner has contended that the Idaho court order violates 10 U.S.C. Section 1408(c)(3) and the Supremacy Clause because the trial court was trying to indirectly do what it could not do directly. This is simply not the case. The Court's action did not directly or indirectly force Petitioner into retirement, or to apply for retirement. The decision simply recognized that fact that Petitioner could have retired and received benefits, but had chosen not to. Its actions protected the interest of Respondent, and in no way violated Section 1408.

Petitioner has erroneously relied on the Supreme Court's decision in *Mansell v. Mansell, supra,* to support his position. This situation is, however, unlike the situation in *Mansell*. In that case, the holding was specifically directed to military disability payments under Section 1408(a)(4)(b). That subsection specifically states that disposable retired pay does not include any monies that must be waived in order to receive compensation under Title 5 or Title 38. 10 U.S.C. Section 1408(a)(4)(6). In order to receive disability payments, the military member must waive an equal portion of his retirement pay. *Mansell*, at 583. The Supreme Court in *Mansell* relied on a specific directive from Congress in excluding military disability pay from community property division. There is no such directive in this case.

II. IF FEDERAL RETIREMENT LAW PREEMPTED STATE RETIREMENT LAW, THE AUTHORITY TO DECIDE ALL ISSUES IN THIS APPEAL HAS BEEN RETURNED TO THE STATES BY THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (USFSPA).

If the USFSPA did preempt state law in the issue of military retirement, the authority to divide the pension has been returned to the states by the plain language of the statute. 10 U.S.C.

§ 1408 provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1991, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The Idaho District Court, in its decision in this case, recognized that only plain and precise language would preempt a state court's authority:

> 10 U.S.C. § 1408(c)(1). The date, June 25, 1991, was the day before the United States Supreme Court decision of *McCarty v. McCarty, supra*, was issued. The Uniformed Services Former Spouses Protection Act (USFSPA) contains three other provisions which are important to the case presently before this Court. These sections are: (1) A court cannot require a member of the armed services to apply for retirement or retire (10 U.S.C. § 1408(c)(3)); (2) The term "disposable retainer pay" is defined to include the total monthly retirement or retainer pay payable to a

member minus certain deductions (10 U.S.C. § 1408(a)(4)); and (3) That a court order providing for the division of property from an armed services member shall be paid no later than ninety days after date of effective service on the secretary if the member is entitled to receive retired or retainer pay or if he is not entitled to receive retired or retainer pay at the time of the effective service of the court order then the payment shall begin no later than ninety days after the date the member first becomes entitled to retired or retainer pay (10 U.S.C. § 1408(d)(1)).

In the case of *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989), the question was whether or not the California Courts could include the disability monies received by the member in place of retirement benefits as a community property asset to be divided wherein the disability pay is specifically exempted under 10 U.S.C. § 1408(4). *The United States Supreme Court determined that only where there is a plain and precise language of the statute, that language will preempt the state court's authority.* (Emphasis added.) Memorandum of Decision and Order, Petitioner's Appendix, page 21a.

III. The U.S. Supreme Court has long recognized that domestic relations are preeminently matters of State law.

On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. *Hisquierdo v. Hisquierdo,*

439 U.S. 572, 581 (1978); *Whetmore v. Markoe*, 196 U.S. 68, 77 (1904).

> Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. *Mansell v. Mansell*, 490 U.S. 581, 587 (1989); *see e.g. Rose v. Rose*, 481, U.S. 619, 628 (1987); *Hisquierdo, supra.*

Section 1408 must directly preempt the action taken by the Idaho Supreme Court in order for such action to be improper.

CONCLUSION

Federal law was properly considered in this case. 10 U.S.C. Section 1408 does not preclude the Court's action in this case. Petitioner was not forced to apply for retirement or to retire, and there was no specific preemption within the applicable statute. If state was preempted, power to divide the community property retirement benefit was restored by the USFSPA.

Respondent, Sherry Mae Balderson, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Gerald Elmer Balderson.

RESPECTFULLY SUBMITTED this 15th day of August, 1995.

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APPENDIX "A"

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SHERRY MAY BALDERSON, Plaintiff, vs. GERALD ELMER BALDERSON, Defendant.	Case No. 11195-D FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Nov. 13, 1992)

Appearances: Debrha J. Carnahan, for the plaintiff
Jean R. Uranga, for the defendant

On August 26th, 1992, the above-entitled matter was called for trial. At that time, the parties announced that they had entered into a Stipulation of Facts, an unsigned copy of which was provided to the court, which was subject to certain oral modifications or clarifications described in open court. The stipulation reflected that there was no dispute over the character, value and division of all community property and debts with the exception of the community interest in the defendant's military retirement benefits. In fact, following the trial, an order was entered upon the parties' stipulation that provided for the division of property and debts except for the retirement benefits. At trial, evidence was presented on the extent and divisibility of the military retirement benefits, and upon equities the court might consider in dividing those benefits. Post trial briefs were then submitted, the last of which was received on September 29th, 1992. The case was considered fully submitted on that date.

The following findings of fact and conclusions of law are issued pursuant to Rule 52(a), I.R.C.P., on the remaining disputed issues:

FINDINGS OF FACT:

1. Sherry May Balderson (Sherry) and Gerald Elmer Balderson (Gerald), were married on August 20th, 1970, in Council, Idaho.

2. Two children were born as issue of this marriage. Stacy Marie Balderson was born on March 4th, 1971, and is thus, over the age of majority. Robert Loyd Balderson was born on September 20th, 1974. He reached age 18 shortly after the trial was completed. The parties' stipulation provided that Gerald would assume responsibility for a loan incurred to pay for Robert's education in lieu of any monthly award of support while Robert continues his education.

3. Gerald entered active duty in the Navy on May 20th, 1969. He had been in the Navy for precisely 15 months when he married Sherry.

4. In 1973, Gerald left the Navy and worked briefly as a lumberjack. He and Sherry agreed he should re-enlist and make the Navy his career. He again entered active duty in 1974 after a ten month absence, and has been on active duty ever since.

5. As of the date of trial, Gerald had 22 years and 5 months, or a total of 269 months of active duty credits.

6. Deleting the 15 months earned prior to marriage, he was on active duty for 254 months during the marriage.

7. Gerald became eligible to retire from active duty following 20 years of service. At that time he held a W2 pay grade.

8. Instead of retiring, Gerald entered into a re-enlistment contract which provided for a promotion to a level W3 pay grade. Under that contract he agreed to forego retirement and remain on active duty until September of 1994.

9. If Gerald retired as of the date of trial at the W3 pay grade, he would have been entitled to receive 2½ percent of his basic pay for that grade ($2,829.90), multiplied by the total years of active service. In his calculation, less than six months of a year is disregarded while more than six months counts as an additional year of service. Thus, Gerald's retirement benefit calculated as of trial would be 2.5% of $2,829.90 multiplied by 22 years, or $1,556.45 per month.

10. The community portion of this amount would be 254/269 times $1,566.45, or $1,479.10 per month.

11. The parties did not stipulate to, or submit evidence on the present value of the community portion of the military retirement benefits. Both acknowledge, however, there is insufficient property to make an offsetting award of other property equal to the lump sum value of the military retirement benefits.

12. Gerald does not plan to retire until he has 30 years of active duty, which will be in slightly less than 8 years. His benefits would be substantially greater with those additional years of service.

13. Gerald's current base pay is $2,829 per month. He also receives various housing or cost of living allowances which depend upon his obligation to support dependents and his service at sea. At present, he actually receives $1,800 every two weeks as gross pay. The difference between the sum of those two figures and his base pay represents the current level of allowances he receives.

14. Sherry will have difficulty meeting her monthly living expenses on her current level of income and has a present need and desire to immediately receive her share of the military retirement benefits rather than wait until Gerald retires in eight more years.

CONCLUSIONS OF LAW:

1. This court has jurisdiction over the parties and the subject matter of this action.

2. All issues in this case have been resolved by stipulation except for the valuation and distribution of the community interest in Gerald's military retirement benefits. Gerald has twenty-two years and five months of active duty with the Navy. Twenty one years and two months of that time accrued during his marriage with Sherry. Although he could have retired after twenty years of active duty, he chose not to. He now plans to retire after thirty years of active duty.

3. Military retirement benefits, like other types of retirement benefits, to the extent they are earned during marriage, must be characterized as community property. *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991); *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68 (1984); *Shill v. Shill*,

100 Idaho 433, 599 P.2d 1004 (1979); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

4. However, the court may treat only the "disposable retired pay" as community property. 10 U.S.C.S. Section 1408(c)(1); *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), impliedly overruling *Beesley v. Beesley*, 114 Idaho 536, 758 P.2d 695 (1988); *Bewley v. Bewley*, 116 Idaho 845, 780 P.2d 596 (Ct.App. 1989).

5. The value or extent of the community interest in retirement benefits must be established as of the time of divorce. *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991); *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988); *Desfosses v. Desfosses*, 120 Idaho 354, 815 P.2d 1094 (Ct.App. 1991).

6. If the employee spouse is eligible to retire but has not retired at the time of divorce, then the valuation of the community interest must be based upon the monthly sum which could have been received as of the date of divorce. *Maslen v. Maslen*, supra; *Shill v. Shill (II)*, supra.

7. Applying these principles to the facts found above, I find that as of the date of trial, based upon his current pay grade and years of service, Gerald had accumulated the right to receive a monthly benefit of $1,566.45 even though he had chosen not to retire. In the absence of any evidence that Gerald would have had deductions from that amount permitted under 10 U.S.C.S. Section 1408(A)(4) if he had retired as of the date of trial, this amount will be considered his hypothetical disposable retired pay for the purpose of computing the value

of the community interest. The community portion of that sum, which is based upon the years of service which accrued during the marriage, is $1,479.10. Sherry's one-half interest in this monthly sum would be $739.55.

8. Gerald is presently committed to remain on active duty until 1994. He received a promotion to his present pay grade as a result of that commitment. However, I conclude that this commitment to serve beyond the date of divorce does not affect the value of his retirement benefits. His commitment will merely delay his receipt of benefits, but he will at some point, enjoy the benefits of the pay grade he achieved during marriage. All increased benefits caused by his post-trial service, will be his exclusively. I see no reason why the community interest should not be valued as of the date of trial, upon Gerald's present pay grade and years of service.

9. Sherry has requested an immediate distribution of her share of these retirement benefits. She argues that she should not be deprived of her share of these benefits because of Gerald's decision to invoke a condition entirely within his control. Gerald, on the other hand, argues that an order for immediate payment would be contrary to the specific restrictions found in the USFSPA.

10. These issues have been specifically addressed in other jurisdictions. The majority view appears to follow the ruling in *In Re Marriage of Gillmore,* 174 Cal.Rptr. 493, 629 P.2d 1 (1981). In *Gillmore,* the California Supreme Court held that an employee spouse cannot by his or her unilateral choice to postpone retirement, deprive the non-employee spouse of his or her interest in the retirement

benefits. The non-employee spouse was entitled to immediate payment of her share of the retirement benefits.

11. Gerald points to a contrary view expressed in *Ruggles v. Ruggles*, 834 P.2d 940 (New Mexico 1992). In *Ruggles*, the New Mexico Supreme Court rejected the ruling in *Gillmore* for a number of reasons. First and foremost was the fact that *Gillmore* permitted a lump sum payment to the non-employee spouse before the date of retirement. In New Mexico, lump sum awards are not permitted. Pension benefits must be awarded on a "pay as it comes in" basis. Id. Next, the court was concerned about equalizing the risk that the retirement benefits may never actually be received. Requiring the non-employee to wait would ensure equality of risk. Finally, the court felt that the non-employee's rights were derivative of the community's rights. The non-employee should receive no greater right than that directly provided by the community asset itself. This means waiting until the actual benefits are received under the terms and conditions of the retirement plan.

12. Comparing the principles found in Idaho cases to these two divergent views, Idaho appears to be clearly more aligned with the *Gillmore* approach. Our Supreme Court has consistently approved of lump sum awards to the non-employee spouse since that method was established in *Ramsey*. Although *Shill I* approved of reserving jurisdiction to value and divide contingent pension benefits, there is no justification to extend that case beyond its facts. There the court was dealing with a non-vested, contingent benefit, which would vest, if at all, within six months of the divorce. This is much different than a case where benefits are vested, matured, but not being

received solely because of the decision of the employee spouse. Despite *Sill I*, our Supreme Court again approved the lump sum distribution method in *Maslen v. Maslen*, supra, as did our Court of Appeals in *Desfosses*, supra, where the employee spouse had not yet retired. Certainly, a lump sum award is an acceptable method of distribution in Idaho where the benefits are vested, matured and actually being received. *Shill v. Shill II*, supra; *Beesley v. Beesley*, 114 Idaho 536, 758 P.2d 695 (1988), impliedly overruled on other grounds by *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

13. In *Shill II* our Supreme Court acknowledged the risks inherent in making an immediate lump sum award, but gave its continued approval of such awards:

> Many of the above-cited cases deal with the "risks" which will be encountered by each of the spouses under various theories of distribution of pension benefits upon divorce. It is clear that there can be no amelioration of all risks which might be presented by the enumerable possible scenarios. If, as previously stated, a lump sum cash-out method were utilized, as seems possible in the instant case, the risks to the non-employee spouse would have been eliminated. However, the risk to the employee spouse of death preventing him from receiving any benefits, would remain. Nevertheless, such solution would have the merit of disentangling the parties and their affairs at a finite point in time. Id., p-120.

Unlike the New Mexico Supreme Court in *Ruggles*, our Supreme Court places more emphasis on the immediate

right of each party to possess their share of the community property and disentangling the parties financially, than on the risks inherent in a lump sum cash-out.

14. In *Shill II*, our Supreme Court followed the reasoning of the Arizona Supreme Court in *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986), in ruling that a non-employee spouse has no right to share in increased retirement benefits which accrue following divorce. The *Koelsch* case also followed the *Gillmore* rule that one spouse cannot defeat the other's interest in retirement benefits by unilaterally choosing not to retire. The rationale for that decision was similar to that found in Idaho cases. Once a portion of the community retirement benefits is awarded to the non-employee spouse, it becomes that spouse's separate property, the use and control of which belongs exclusively to that individual. Id., p-1239.

15. Lump sum awards have been approved because of the long line of Idaho authority requiring the court to distribute community property in such a way as to give each party immediate control over their respective share. The court in *Gillmore* based on this same concept – the right of each spouse to utilize and control their share of benefits at the time of divorce. The court in *Koelsch*, a decision cited by our Supreme Court with approval on other issues, reached a similar conclusion. Both appear to be consistent with Idaho principles of community property law, while the *Ruggles* decision does not. Therefore, I conclude that an employee spouse cannot deprive the non-employee spouse of immediate enjoyment of his or her share of retirement benefits by making a unilateral decision to continue working after the date of first eligibility for retirement.

16. In 1982, Congress passed the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. Section 1408. The USFSPA gave state courts the authority to characterize a service member's disposable military retirement pay as marital property and also provided for the direct distribution of the non-employee spouse's portion of those benefits under certain conditions. The Act prohibits state courts from ordering a service member to apply for retirement or to retire at some particular time in order to have payments distributed under the Act. 10 U.S.C. Section 1408(c)(3). Gerald argues this provision of the Act prohibits a court from making any award of benefits before actual retirement, otherwise a court would be indirectly forcing a service member to retire.

17. This issue has been specifically addressed in three California appellate decisions. In each decision, the court rejected Gerald's argument and awarded the non-employee spouse the present value of military retirement benefits even though the service member had not yet retired. *In Re Marriage of Scott*, 156 Cal. App.3d 251, 202 Cal.Rptr.716 (Cal.App.4 Dist. 1984); *In Re Marriage of Jacobson*, 161 Cal.App.3d 465, 207 Cal.Rptr. 512 (Cal.App.2 Dist. 1984); *In Re Marriage of Castle*, 180 Cal.App.3d 206, 225 Cal.Rptr. 382 (Cal.App. 4 Dist. 1986). In *Castle* the court pointed out that the doctrine of *Gillmore* was specifically cited to the Senate prior to the passage of the USFSPA. See U.S.Code Cong. & Admin. News, pp. 1596, 1639. Yet, the act was passed giving the states power to apply their own local law to the characterization and division of disposable military retirement pay, subject only to the specific limitations of the Act. Upon this authority, I conclude that the USFSPA does not prevent

this court from awarding the non-employee spouse his or her interest in the disposable military retirement pay before the employee spouse actually retires.

18. The final issue to be addressed is the most difficult one. Even though Sherry has the right to immediate enjoyment of her share of the retirement benefits, valued at the time of divorce, how can the court effectively distribute those benefits to her under the particular circumstances of this case. A Qualified Domestic Relations Order is not applicable to military retirement benefits. Direct payment from the government under the USFSPA cannot be ordered until actual retirement. There is insufficient property to make an offsetting award of other property equal to the value of the retirement benefits. The only other option that has been specifically discussed and approved in Idaho is a lump sum judgment payable in installments within a reasonable time. *Ramsey v. Ramsey,* supra; *Beesley v. Beesley,* supra. However, I do not believe that these are the only alternatives this court can consider merely because they are the only ones which have been discussed by our appellate courts. The decisions cited above reflect that new alternatives are periodically reviewed and approved. While the *Ramsey* court appeared to lay down an unequivocal rule which required a lump sum award of the present value of retirement benefits to the non-employee spouse, the court subsequent acknowledged that an offsetting award of property would be acceptable, and direct monthly payments under USFSPA for military benefits or by a Qualified Domestic Relations Order for other qualified private plans, could also be ordered. In *Maslen,* the court acknowledged the difficulty not only in valuing benefits

under very different retirement plans, but also the difficulty in dividing those benefits. Rather than mandate particular treatment of retirement benefits in every case, the court stated "[W]e conclude that it is a better policy to allow the trial court sufficient discretion to consider the circumstances in each case to determine the most equitable manner for determining and dividing the marital portion of pension benefits". *Maslen v. Maslen*, supra.

19. The court in *Koelsch* provides some excellent guidance on the very dilemma facing this court. Where the right to receive retirement benefits has matured, but the employee spouse continues to work, the most preferable method is a lump sum award which is payable in full at a specified time, or payable in installments which may or may not correspond with the amount the employee spouse would have received if the employee spouse had retired. *Koelsch v. Koelsch*, supra, p-1242. This award should include the payment of interest and could be secured by a lien on any or all of the employee spouse's separate property. Id. However, if a lump sum award would be impossible or inequitable, the court could award the non-employee spouse a monthly amount equal to the share of the benefit which would have been received if the employee spouse had retired. Id. p-1243. If the employee spouse does retire, then both interests could be paid directly to each by the plan administrators, or, in cases of military retirement, by the federal government. Id.

20. The last option which the court in *Koelsch* left open under very limited circumstances, would be to defer all or part of the non-employee's monthly payments until

the employee spouse retires. Under this alternative, however, the non-employee spouse would be entitled to recover all of the deferred payments with interest, the payment of which would be secured by a lien on the employee spouse's separate property or by a separate policy of insurance naming the non-employee spouse as irrevocable beneficiary in an amount sufficient to pay the differed payments and interest. Id., p-1243.

21. The objective in selecting the best alternative was described in *Koelsch* in the following way:

> We urge the parties and the trial court to be as creative and flexible as possible, within the guidelines provided in this opinion, to both guarantee that the non-employee spouse will receive his or her share of the pension benefits and to avoid the undesirable consequence of encouraging employees to retire against their wishes. p-1243.

22. I believe the best of the options described above would be that which would require Gerald to pay Sherry her $739.55 share of the retirement benefits she would have received had he chosen to retire as of the date of divorce until such time as he does retire when that sum can be paid directly to her under the USFSPA. I consider this to be the best option under the circumstances of this case for the following reasons: (1) there is not enough other community property to make a lump sum, offsetting award of other property to Sherry; (2) Gerald's income is limited and it would not appear to be feasible that he could pay off a lump sum award in installments within a reasonable time; (3) This option gives Sherry immediate access to her share of retirement benefits as

our Idaho law dictates; (4) Gerald does appear to have the ability to pay this sum without being compelled to retire; (5) This option clearly segregates the community interest from any separate interest Gerald might accrue following divorce; (6) it avoids the problem of significant fluctuations in present value which are caused by the application of different mortality tables and different discount rates; (7) It fairly places the risk of death before retirement upon the party who has made the decision to continue working.

23. Sherry has requested that Gerald be ordered to maintain survivor benefits in her favor and that she be permitted to share in any future cost of living increases. Although this court is not fully acquainted with survivor benefit options for military retirees, it does appeal that Gerald may be eligible to make an election to purchase an annuity for Sherry under the Survivor Benefit Plan for the armed forces under 10 U.S.C.A. Section 1448. Such an election, if taken after retirement, would automatically reduce Gerald's retired pay by an amount equal to the cost of the annuity. In light of *Mansell v. Mansell,* and the way the USFSPA reads, it would appear that the intent of the statute is that just as disability income cannot be affected by local laws, the amount deducted for this type of annuity cannot as well. 10 U.S.C.S. Section 1408(4)(D). I conclude that if Sherry desires to have this protection, she will have to bear the cost of the annuity. If the election can be exercised after 20 years of service but before actual retirement, the cost of the annuity would be paid by Gerald, but deducted from his payment of $739.55 to Sherry. After retirement, the amount paid

directly to Sherry under the USFSPA would be reduced by the cost of the annuity.

24. Sherry may request Gerald to make the election for such an annuity within 60 days of the entry of this Decree, or at any subsequent time that Gerald is permitted to make such an election under the provisions of the Survivor's Benefit Plan, 10 U.S.C.S. Section 1448.

25. After actual retirement, Sherry will be entitled to a percentage share of any cost of living increase awarded to Gerald. That percentage will be a fraction where the numerator is 254 months, which is the number of months of service accrued during the marriage, and the denominator is the total months of service at retirement. See *Utz v. Utz*, Ada County Case No. 13998-D, Findings of Fact and Conclusions of Law issued December 16th, 1991, pp.14-19.

26. Counsel for the plaintiff is requested to submit a proposed form of judgment which incorporates the relief awarded in this decision and the relief awarded upon the parties' stipulation.

It is so ORDERED this 13th day of November, 1992.

/s/ Michael Dennard
MICHAEL DENNARD
Magistrate

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF IDAHO
DOCKET NO. 21354

SHERRY MAY BALDERSON,	)	**Boise, September 1994**
	)	**Term**
Plaintiff-Respondent	)	
	)	**1995 Opinion No. 45**
vs.	)	
GERALD ELMER BALDERSON,	)	**Filed: May 22, 1995**
	)	
	)	**Frederick C. Lyon, Clerk**
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County. Hon. Robert G. Newhouse, District Judge; Hon. Michael Dennard, Magistrate Judge.

Appeal from the magistrate court's valuation of military retirement benefits upon divorce and the court's distribution of a sum equal to one-half the community interest in the benefits. *Affirmed* in part, *Vacated* in part, and *Remanded.*

Uranga, Uranga & Bieter, Boise, for appellant. Jean R. Uranga argued.

Wilson, Carnahan & McColl, Boise, for respondent. Debrha J. Carnahan argued.

McDEVITT, C.J.

I.

BACKGROUND AND PROCEDURE

Gerald and Sherry Balderson were married on August 20, 1970. Gerald entered active duty in the Navy on May 20, 1969, fifteen (15) months prior to his marriage to Sherry. Gerald left the Navy for a short time in 1973, but re-enlisted for active duty in 1974. The decision to re-enlist was made by both parties with the understanding that the Navy would be Gerald's career. Gerald has been on active duty in the Navy since re-enlisting in 1974. Under Gerald's re-enlistment contract, he would receive a promotion and, in return, Gerald would forego retirement until September 1994. Even though Gerald was eligible for retirement in 1994, he chose to remain in the military until he had completed 30 years of active duty. Gerald will attain 30 years of service in the year 2000, approximately eight years from the time of divorce, and he intends to retire at that time.

In August of 1989, Sherry initiated divorce proceedings. At the date of trial, Gerald has been on active duty for twenty-two (22) years and five (5) months, or 269 months. Not including the fifteen months of duty prior to marriage, Gerald was on active duty for a total of 254 months during marriage. In the divorce, there was no dispute as to the character, value, and division of all community property, with the exception of the community interest in Gerald's military retirement benefits. Sherry sought one half of Gerald's military retirement pension earned during marriage.

The magistrate court valued the community interest in the military retirement benefits at $1,479.10 per month. This amount was based on Gerald's time spent in the military during marriage as compared to his total time of service as of the date of divorce. The magistrate court then ordered Gerald to pay Sherry in installments a sum equal to her one-half interest in the benefits, $739.55 per month. The magistrate court awarded the benefits to be paid in installments because there were insufficient assets to make an offsetting lump sum award to Sherry and because this award effectively gave Sherry immediate control over her community share in the retirement benefits without compelling Gerald to retire.

Gerald appealed the decision of the magistrate court which was affirmed by the district court. The district court modified the magistrate court's decision to permit Gerald to petition the magistrate court for re-examination of its order if it is determined that $739.55 equals more than fifty percent of his monthly "disposable retired or retainer pay" under the Uniform Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408(e)(1).

Gerald then appealed the district court's ruling. The Court of Appeals agreed with the district court's ruling and affirmed the magistrate court's decision as amended. Gerald then petitioned this Court for a review of the Court of Appeal's decision. On review Gerald argues that the Supremacy Clause of the United States Constitution precluded the magistrate court from ordering Gerald to begin making immediate payments to Sherry for her interest in Gerald's military retirement benefits under 10 U.S.C. § 1408(c)(3). Gerald also argues that the magistrate court erred by failing to order payment of Sherry's share

of the retirement benefits not commence until Gerald retired. Gerald argues that the retirement benefits should be valued at the time Gerald actually retires rather that at the time of divorce. Both parties seek attorney's fees on appeal.

This Court affirms in part, vacates in part, and remands this case to the magistrate court.

II.

PREEMPTION ISSUE

When this Court reviews issues first decided in the magistrate court, which are then presented to the district court on appeal, this Court reviews the magistrate court's decision independently of, but with due regard for, the district court's appellate decision. *Ireland v. Ireland*, 123 Idaho 955, 957-58, 855 P.2d 40, 42-43 (1993). This Court will uphold the findings of the magistrate court if the findings are supported by substantial and competent evidence. *McNelis v. McNelis*, 119 Idaho 349, 351, 806 P.2d 442, 444 (1991). However, issues of law are freely reviewed by this Court. *In re Mundell*, 124 Idaho 152, 153, 857 P.2d 631, 632 (1993).

Because the magistrate court ordered a distribution of the sum equal to Sherry's interest in the military retirement benefits, rather than distributing the pension benefits themselves, we hold that the magistrate court did not err in concluding that Idaho law was not preempted by 10 U.S.C. § 1408(c)(3).

The Uniform Services Former Spouses Protection Act (USFSPA) gives courts the authority to treat disposable

military retired or retainer pay as community property in accordance with the laws of the court's jurisdiction, subject to specific limitations in the Act. 10 U.S.C. § 1408(c)(1). The USFSPA's limits on state courts which are relevant to this proceeding are (1) that only disposable retirement income may be considered as community property, (2) that a court may not order a military member to retire in order to effectuate a payment of retirement benefits, and (3) that no more than fifty percent of the disposable retired or retainer pay may be paid out. 10 U.S.C. §§ 1408(c)(1), (c)(3), (d)(1). There is no authority in the Act for a court to order direct payments of the military retirement benefits before actual retirement. The magistrate court's order recognized this, and instead of awarding Sherry an interest in the pension benefits, which the court could not do, it awarded Sherry the value of a sum equal to her interest in the pension benefits.

The magistrate court is not precluded by the USFSPA from valuing the community property interest in the benefits and distributing the other assets of the community to account for the value of the benefits. Pursuant to this authority, the magistrate court calculated the value of the community interest in the retirement benefits and the value of Sherry's one-half interest in the benefits. The magistrate court then awarded Sherry an amount equal to her interest in the retirement benefits.

The magistrate court did not exceed its grant of authority under the USFSPA because it only valued the military retirement benefits under community property principles and did not divide or distribute the actual pension benefits at the time of divorce. The magistrate court did not interfere with the purposes of the USFSPA

to allow for the distribution of military retirement benefits under community property laws.

We affirm the decision of the magistrate court to the extent that the magistrate court only assessed the value of the military retirement benefits under Idaho community property law.

III.

VALUATION AND DISTRIBUTION ISSUES

The next issue which must be addressed is whether the magistrate court properly valued and distributed the disputed community assets. The trial court has sufficient discretion to consider the circumstances of each case and decide the most equitable manner for valuing and dividing the marital portion of pension benefits. *Maslen v. Maslen,* 121 Idaho 85, 91, 822 P.2d 982, 988 (1991). In reviewing the magistrate court's disposition of community property, this Court will not disturb the disposition unless there is evidence of an abuse of discretion. *Koontz v. Koontz,* 101 Idaho 51, 52, 607 P.2d 1325, 1326 (1980); *see also Olsen v. Olsen,* 125 Idaho 603, 606, 873 P.2d 857, 860 (1994) (vacating and remanding the decision of the trial court where it applied the inappropriate rates to capitalize excess earnings and to discount for marketability in determining the value of the marital interest in the closely held corporation).

A. VALUATION

This Court has recognized different methods of valuing pension plans, such as the time rule method and the

accrued benefit method. *Maslen*, 121 Idaho at 89-90, 822 P.2d at 986-87. Because retirement benefit plans are so varied in their provisions, funding, and administration, valuation cases are to be decided on an individual basis. *Id.* at 91, 822 P.2d at 988; *Shill v. Shill*, 115 Idaho 115, 120, 765 P.2d 140, 145 (1988) (*Shill II*). The benefits should be valued at the time of divorce, because benefits acquired after the divorce are the separate property of the employee spouse. *Id.*

The magistrate court was within its discretion to determine the method of distribution of community assets, and we will not disturb this magistrate court's installment method of distribution of the Baldersons' community assets. However, in applying this method of distribution, the valuation of the community interest in the retirement benefits requires a discounting of the benefits to their present day value as of the date of divorce. If the benefits are not discounted to their present value, the value assessment does not accurately reflect the non-employee spouse's actual interest in the benefits, and the value of the benefits can be inflated, resulting in an inequitable distribution of the assets.

The magistrate court calculated the community interest in the disposable military retirement benefits as being the amount Gerald would receive as of the date of divorce based on his date of divorce income and his time spent in active service during the marriage, or $1,479.10 per month.[1] Sherry's interest in the benefits was determined to be one-half of the community interest, or

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[1] The magistrate court in calculating the amount of retirement benefits Gerald was to receive, multiplied his total number

$739.55 per month. The magistrate court properly considered the benefits that were earned during the marriage in its valuation of the community interest in the retirement benefits, but it failed to calculate the present value of those benefits by calculating the lump sum future value of Gerald's retirement benefits and discounting that sum to its present-day value prior to determining the value of Sherry's interest in the benefits and distributing the assets.

B. DISTRIBUTION

Under I.C. § 32-712(1)(a), the trial court has the power to distribute community property in an equitable manner unless there are compelling reasons to distribute the property otherwise. The general rule is that the trial court should, if possible, order the disposition of the community property upon divorce to give each spouse sole and immediate control of his or her determined share. *Maslen v. Maslen*, 121 Idaho 85, 92, 822 P.2d 982, 989 (1991). However this rule must be applied within the confines of Idaho's statutes which delineate separate and community property interests. I.C. §§ 32-903, 32-906; *Shill II*, 115 Idaho 115, 118, 765 P.2d 140, 143 (1988); *Maslen*, 121

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of years in the service as of the date of divorce by his pay grade at the date of divorce. (2.5% (the percentage of pay Gerald would receive) X $2829.90 (Gerald's pay grade at divorce) X 22 years (rounded off duration of active service) = $1,556.45.) The community portion of this amount was calculated to be $1,479.10 ($1,556.45 X 254/269 (number of months in service during marriage/total number of months in service.))

Idaho at 94, 822 P.2d at 991 (McDevitt, J. concurring in the result).

In *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979) (*Shill I*), this Court recognized two possible methods for dividing a pension plan: "[o]ne is to award the employee the pension and assign the non-employee-spouse assets of a value equal to the present value of the contingent benefits." (the "lump sum" method) "The other method of dividing the rights is to reserve jurisdiction until retirement and divide the actual monetary benefit when received." (the "as if, and when" method) *Id.* at 437, 599 P.2d at 1008. However, in situations like the present one, where the largest marital asset is the retirement benefit and an inequitable division of the pension benefits would result from using either of the first two methods, this Court has recognized another method of dividing the assets. *Beesley v. Beesley*, 114 Idaho 536, 541-42, 758 P.2d 695, 702-03 (1988). This method of distributing the benefits allows a court to make an award of installment payments in lieu of a lump sum award. *Id.* When an award is made under the installment method, the interest accruing on the award at the rate used to discount the retirement benefits to their present value is to be awarded to the recipient spouse. *Id.*

Although a lump sum award is the preferred method of distribution, the magistrate court was within its discretion to consider the circumstances of this case and to decide that the lump sum method paid in installments was the most equitable manner for valuing and dividing the marital portion of pension benefits. *Maslen*, 121 Idaho at 91, 822 P.2d at 988. The magistrate court's method of distribution of a determined lump sum in installments

gave Sherry immediate control of a sum equal to her determined share of the benefits paid out over time. Insufficient property was available to make an offsetting award equal to the value of the retirement benefits, and the other methods of distribution would have resulted in an inequitable division of the retirement benefits.

This distribution method is in accord with Idaho's case law and furthers the policies of separating the parties' interests in the property. The parties have immediate control over their interest in the community property and a lesser risk to future expectations of a contingent interest in the retirement benefits.

The magistrate court did not abuse its discretion in ordering Gerald to begin making immediate payments to Sherry of an amount equal to her interest in the military retirement benefits. However, the magistrate court did not correctly calculate the interest to which Sherry is entitled. Because Sherry was awarded a sum equal to her interest in the retirement benefits to be paid in installments, she is entitled to interest accrued at the rate used to discount the retirement benefits to their present value. *Beesley,* 114 Idaho at 541, 758 P.2d at 702.

The decision of the magistrate court is vacated to the extent that it failed to discount the community interest in the retirement benefits to their present day value and remanded for a calculation of the present day value of the community interest in the retirement benefits for purposes of distributing to Sherry a sum equal to one-half that value. Also on remand the magistrate court is to calculate the interest on the installment payments to which Sherry is entitled.

IV.

ATTORNEY'S FEES

Both parties request attorney's fees on appeal. Gerald requests attorney fees pursuant to I.C. § 12-121. Idaho Code § 12-121 provides that a judge may award reasonable attorney's fees in any civil action to the prevailing party. Generally reasonable attorney's fees will only be awarded to the prevailing party under I.C. § 12-121 when the court is left with the "abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably and without foundation." *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). There is no basis in the record that Sherry defended the suit frivolously, unreasonably and without foundation. No attorney's fees are awarded to Gerald.

Sherry requests attorney fees pursuant to I.C. § 32-704. Idaho Code § 32-704(3) provides that a court may consider the financial resources of both parties and the factors set forth in I.C. § 32-705 to determine whether a party is entitled to an award of attorney fees. *Ireland v. Ireland*, 123 Idaho 955, 960, 855 P.2d 40, 45 (1993). In considering Sherry's financial resources, this Court holds that she has sufficient financial resources and declines to enter an order requiring Gerald to pay Sherry's fees.

V.

CONCLUSION

The decision of the magistrate court is affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. Costs to Appellant.

Justices TROUT, SILAK, and Justice Pro Tem Reinhardt, **CONCUR.**

JOHNSON, Justice, **dissenting.**

I respectfully dissent. In my view, the magistrate judge's order requiring Gerald to begin making immediate payments to Sherry for her interest in Gerald's military retirement benefits violates the Supremacy Clause of the U.S. Constitution because 10 U.S.C. § 1408(c)(3) and other provisions of USFSPA preempt the judge's authority to do so.